IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 345 F. Supp. 527 and is reproduced in the Joint Appendix filed with the Petition for a Writ of Certiorari (J. App.) at pages 41a-75a. The opinion of the United States Court of Appeals for the Second Circuit, reversing in part the decision of the District Court, is reported at 485 F.2d 1355 and is reproduced in the Joint Appendix at pages 1a-38a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 24, 1973.

A timely petition for rehearing, with suggestion for rehearing en banc, was denied on November 14, 1973, and an extension of time to file a petition for a writ of certiorari to and including February 21, 1974 was granted by Mr. Justice MARSHALL on February 7, 1974. The petition was filed on February 21, 1974 and was granted on May 13, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

As framed by the Court in granting the petition, the questions presented are:

1. Can statements by counsel for the Republic of Cuba, that petitioner's unjust enrichment counterclaim would not be honored, constitute an "act of state"?

2. If so, is an exception to the act of state doctrine created, under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), where petitioner's counterclaim does not exceed the net balance owed to Cuba on its claims by petitioner's co-defendants, and where all claims and counterclaims arise out of the subject matter in litigation in this case?

Statement

On September 15, 1960, several Cuban manufacturers of cigars were nationalized by the Republic of Cuba. Before and for a short time after nationalization (or "intervention"), cigars manufactured by these manufacturers were shipped to three principal importers in the United States ("the importers"), including Petitioner ("Dunhill"). Most of the cigars shipped after intervention were not paid for, but several payments, intended to cover amounts owed for pre-intervention shipments, were made by the importers after intervention.

Lengthy litigation ensued. In early 1961, these former owners ("the owners"), who fled to the United States and elsewhere, sued the importers to obtain payment on all cigars shipped both before and after intervention, and sued both the importers and the Cuban government for infringing their United States trademarks applicable to the cigars. The Cuban agents appointed to manage the nationalized businesses, called "interventors," also sought (by attempting to intervene in the owners' actions) to recover for all cigars shipped by the importers.

Holding in abeyance the actions against the importers, the District Court resolved the threshold disputes between the interventors and the owners by holding that (1) the owners could prosecute claims for trademark infringement, and (2) the interventors could recover for post-intervention shipments. These holdings were affirmed on appeal. *Palicio* v. *Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967). See J. App., 5a-6a.

During the *Brush & Bloch* litigation, it was assumed by all the parties that only insignificant post-intervention payments had been made for pre-intervention shipments. Not until after the respective rights of the owners and interventors had been established by *Brush & Bloch* did it become apparent that those assumptions were incorrect. J. App., 43a-44a. Discovery revealed that substantial amounts were involved and that those payments might well have found their way into the hands of the interventors. During the trial the importers, including Dunhill, claimed a right to recover against the interventors for any such moneys that the importers might eventually be held to owe the owners. J. App., 45a.

The interventors' principal line of defense to this claim of the importers was to dispute that they ever received the payments. J. App., 20a-22a and 46a. During the course of

trial, as proof was adduced that the interventors *had* actually received these payments, counsel for the interventors suggested that his clients would not honor a claim for repayment of those funds. This suggestion the Court of Appeals turned into an "act of state." Apart from counsel's statements, not a shred of evidence was adduced at trial or before the Court of Appeals to support counsel's contention that any act of the Cuban government had taken place with respect to the funds at issue.

The District Court found that the payments for pre-intervention shipments had, in fact, been received by the interventors. The court held that the importers were nevertheless liable to the owners for those amounts, with interest. It also held that the importers could recover those amounts, with interest, from the interventors. The other two importers, who owed larger sums to the interventors than they had mistakenly paid them, recovered these amounts by way of set-off. Dunhill, having paid more to the Cuban government's agents for pre-intervention shipments than it owed for post-intervention shipments, recovered an affirmative judgment against the interventors for the difference. J. App., 73a-75a. That difference was substantially less than the net balance found owing from the other importers to the interventors. J. App., 44a-45a. Dunhill's post-trial motion to obtain the affirmative judgment was not opposed by the interventors. J. App., 74a-75a.

The Court of Appeals for the Second Circuit reversed the holding of the District Court insofar as it granted Dunhill an affirmative judgment. In effect, it required Dunhill to pay twice for the same merchandise and allowed the interventors to retain money to which they had been held clearly not entitled. The sole ground for the reversal by the Court of Appeals was its view that it was bound to recognize an act of state by the government of Cuba to bar such affirmative relief. However, relying on *First National*

City Bank v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the Court also held that the act of state doctrine barred consideration of the importers' counterclaims against the interventors only to the extent they exceeded the judgments which the Cuban interventors had, in turn, recovered against the importers. J. App., 28a-31a. Thus, the judgment was reversed only as to Dunhill, which alone had obtained an affirmative judgment against the Cuban interventors. And of what did this act of the Cuban state consist? Nothing other than unsubstantiated statements of counsel for the interventors that they would not pay any judgment against them ordered by the Court.

Summary of Argument

I. An in-court statement of counsel cannot constitute an "act of state." Any "act of state" includes two distinct elements, both of which are lacking here: First, the act must be a public act of a recognized foreign sovereign, and, second, the act must be committed within that sovereign's own territory. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). In all previous cases before the court, there has in fact been such a public act within the sovereign's own territory. It is such acts, and only such acts, which the courts may be required to respect in rendering judgment.

The in-court statements of counsel are not the public act of a sovereign and clearly did not take place within the sovereign's territory. Counsel's remarks were no more than statements of his litigating position. To allow such statements to be deemed an act of state would render foreign sovereigns immune to adverse judgments in our courtrooms.

This Court has recently explored at length the bases for and appropriate application of the act of state doctrine.

In *Sabbatino* it suggested that the *major* consideration in applying the act of state doctrine to a given case is the relative competency of the political versus the judicial branches of the government to consider an issue that may affect the foreign relations of the nation. If the act of state to be respected is a decree, an order, some action of a sovereign within its own territory, the political branches may well be more competent than the judicial to judge if those acts should be respected. In such cases, justification exists for the application of the act of state doctrine. However, this case raises no sensitive political issues requiring the court to defer its decision to the political branches. It is a commercial case, in which a foreign government's agents have invoked the processes of our courts and can and should be required to abide by their judgments.

To decide against the respondent will in no way cause affront to the Cuban government; its agents entered our courts seeking an adjudication of entitlement to payment for shipments of tobacco they claimed to own. To permit application of the act of state doctrine here could have a major unsettling effect on international transactions which are increasingly made with commercial agencies of foreign governments. It would establish the precedent that after invoking the aid of our courts to seek relief, such agencies could with impunity in mid-trial call a halt to the proceedings when their counsel thought it expedient. Nothing this Court has ever had to say on the act of state doctrine supports such a rule.

II. Assuming, *arguendo*, that the act of state doctrine was properly invoked, Dunhill is, nevertheless, entitled to recover the full amount of its counterclaim. The exception to the act of state doctrine, created by *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), is applicable to the case at bar. Indeed, the facts here present an even stronger case for judicial consideration of a defendant's counterclaim.

There is no danger that a judicial determination of Dunhill's counterclaim would embarrass American foreign relations. The Cuban government selected the American courts in which to adjudicate its dispute with Petitioner. As far as the record discloses, that government has taken no political act challenging the competency of our courts to render judgment in this commercial matter. And there has been absolutely no indication from our Department of State that delicate foreign relations will be disturbed by an adjudication of the issues presented here.

To the extent the Executive Department has expressed any sentiment relevant to this case, it suggests strongly that Dunhill's counterclaim must be heard. In *First National City Bank*, the courts relied on a letter of Legal Advisor Stevenson denying executive objections to adjudication. The letter itself states that the policy expressed therein applied to the First National City Bank dispute and to "like cases." *See Banco Nacional de Cuba* v. *First National City Bank*, 442 F.2d 530, 538 (2d Cir. 1971), *rev'd* 406 U.S. 759 (1972).

In any event, granting Dunhill the remedy it seeks will not result in enforcing an affirmative judgment against the Cuban government. Cuba has submitted for judicial resolution claims that are greatly in excess of the counterclaims against it. Since the claims and counterclaims all arise out of the same subject matter, the equities for allowing the counterclaim in full are even more strongly with Dunhill than they were with the defendant in *First National City Bank*. All such a judgment will do is to avoid the unfair and surely anomalous result of requiring Dunhill to pay twice (with interest) for the same goods because of a dispute between a foreign government and its own former citizens.

ARGUMENT

I.

The in-court statements by counsel that the Republic of Cuba would not honor the importers' unjust enrichment counterclaims did not constitute an act of state.

The first issue is whether or not the in-court statements by counsel for the Republic of Cuba that his client would not honor Petitioner's claim for repayment of funds, absent any further evidence of some official act of the political sovereign of that nation, can constitute an act of state. We respectfully submit that such statements lack the essential elements of an act of state and that clothing such statements with the mantle "act of state" would not serve the fundamental purpose underlying the doctrine. Accordingly, those statements should not be deemed to constitute an act of state.

A. Counsel's in-court statements lack two essential elements of an act of state: they were not public acts of a recognized sovereign, nor were they made within the territorial jurisdiction of a foreign sovereign.

Most probably having its genesis early in our history [*see Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808); *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812)], the act of state doctrine has more recently been applied with increasing frequency to the expropriatory acts of foreign governments, including the Respondent, Republic of Cuba. In general terms, it seems agreed that the doctrine is "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal government." *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972). Since, however, application of the doctrine results in abstention by the courts from deciding cases and controversies otherwise properly before them, this Court also has recognized that:

> "The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rule appropriate for decision from among various sources of law including international law." *Id.*, 406 U.S. at 763.

Although there may exist some uncertainty as to the precise circumstances under which the act of state doctrine will be applied, the essential elements of an act of state have been set forth clearly and repeatedly both in this Court and elsewhere. The classic formulation of the doctrine was enunciated by the Court in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). In recognizing the validity of certain acts of a revolutionary Venezuelan military commander whose government had been later recognized by the United States, the Court said:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." 168 U.S. at 252.

These elements were restated by the Court in *Sabbatino* as follows:

> "The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964).

These essential elements—(a) that there be a public affirmative act of a recognized sovereign and (b) that such an

act be committed within the sovereign's own territory—have been consistently regarded as the *sine qua non* of an act of state by case and commentator alike.*

Moreover, every other case thus far which has applied the act of state doctrine has in fact involved an affirmative, public act by a foreign governmental authority within its territorial jurisdiction. Often the affirmative step consists of an executive decree, as in *Banco Nacional de Cuba* v. *First National City Bank*, 270 F. Supp. 1004, 1009 n.6 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970); *vacated and remanded*, 400 U.S. 1019 (1971); *adhered to on remand*, 442 F.2d 530 (2d Cir.); *rev'd*, 406 U.S. 759, 760 (1972); in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401-05 & nn. 3 & 7 (1964); and in *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 51, 242 N.E.2d 704, 707 (1968). In other cases, the act is legislative in nature. *E.g.*, *Eastern States Petroleum Co.* v. *Asiatic Petroleum Corp.*, 28 F. Supp. 279 (S.D.N.Y. 1939); *see* 2 D. O'Connell, International Law 874-76 (1965). Occasionally (as in times of civil strife), the step is not formal. But even in such cases there is always an affirmative step evidencing the intentional use of sovereign power. *See, e.g.*, *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) (house arrest by military commander during civil war); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) (forcible seizure of property by military commander during civil war); and *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918) (same).

* *United States* v. *Pink*, 315 U.S. 203, 233 (1942); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (quoting *Hernandez*) (1918); *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 52, 242 N.E.2d 704 (1968). *See also The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 284 (1972); Note, *Act of State*, 14 Harv. Int'l L.J. 131, 133 (1973); Recent Developments, *The Act of State Doctrine*, 8 Texas Int'l L.J. 271, 274 (1973); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1608-09 (1962); 12 A.L.R. Fed. 707, 732.

And in those few cases where the specific issues were raised as to whether the "act" was a public expression of a sovereign or was committed in its territory, the courts have insisted that both requirements be met. Thus, in *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), appellant claimed that the designation of certain ports as "safe" for its ship constituted an act of state, and thus it was relieved of liability for damage to the ship. The Second Circuit, relying on the formulation of the act of state doctrine in *Sabbatino*, concluded that:

> "designation of the ports as safe was not an act performed within the territory of Spain, nor was it performed by the Government of Spain. . . . Appellant's act of state argument is therefore considerably wide of the mark." 336 F.2d at 363.

Similarly, in *Menzel* v. *List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966); *mod. on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967); *rev'd on other grounds*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969), where it was alleged as a defense to a replevin action that the previous requisition of a painting by the Nazis was an act of state the legality of which could not be questioned, the court held, *inter alia*, that since the painting was taken in Brussels, it was not an act of state because it was "not [done] within its own territory." 49 Misc. 2d at 311, 267 N.Y.S.2d at 815. *See also* 14 Harv. Int'l L.J. 131, 133 (1973); 12 A.L.R. Fed. 707, 775-76.

Here, there was no proof of *any* act by the Cuban interventors or any other responsible authority of the Republic of Cuba. Whatever the evidentiary worth of counsel's statements that his client would not honor the importers' claims, they proved nothing more than the fact that Cuba was not affirmatively assuming an obligation it was contest-

ing in court. Assuming, *arguendo,* that counsel's statements could prove anything, they pointed to no affirmative exercise whatsoever of the sovereign power of a foreign country within its territory, as had been required by every decision heretofore.

Once before the Second Circuit held that an in-court statement constituted evidence of a sovereign act; that holding was reversed by this Court. In *Compania Espanola de Navegacion Maritima* v. *The Navemar,* 303 U.S. 68 (1938), a verified statement by the Ambassador of Spain that his country had taken possession of a vessel was filed in court. The Court of Appeals of the Second Circuit had held on the basis of that statement that the vessel was immune from judicial process. This Court held such a statement not proof of a sovereign act.

If a foreign plenipotentiary's formal and verified statement is not competent evidence of a sovereign act within its territory, surely counsel's litigating position should not constitute conclusive proof of such an act. The Court below dwelt at length on the fact that an act of state need not be formal, but that fact does not obviate the requirements that there must be some public, affirmative act, that the act be that of a government official within the sovereign's territory, and that there must be competent proof of the act. All these elements are lacking here.

B. The fundamental policy underlying the act of state doctrine would not be served by expanding it to encompass counsel's in-court statements.

In Point A, *supra,* we demonstrated that attributing act of state status to counsel's in-court statements clearly would be contrary to both the language and the holdings of decisional and other authority. We submit further that such an expansion of the act of state doctrine would not serve its fundamental purpose as enunciated by this Court in its most recent decisions dealing with the doctrine.

The courts have offered various rationales for application of the act of state doctrine. The earlier cases suggested that the application of the doctrine was compelled by the inherent nature of sovereign authority. *See Underhill* v. *Hernandez,* 168 U.S. at 252; *Oetjen* v. *Central Leather Co.,* 256 U.S. at 303-04. However, the Court in *Sabbatino* explicitly rejected so broad a justification for the doctrine:

> "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law." 376 U.S. at 421.

The *Sabbatino* Court further limited the possible justifications for the act of state doctrine:

> "The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." 376 U.S. at 423.

The Court then set out what it deemed to be the proper rationale for the doctrine:

> "It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." 376 U.S. at 423.

And although there was manifest disagreement in *First National City Bank* concerning the precise circumstances under which the act of state doctrine should be applied, all of the Justices there agreed with *Sabbatino* that the doctrine's:

> "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."

First National City Bank v. *Banco Nacional de Cuba*, 406 U.S. at 763 (Rehnquist, *J.*); *id.* at 774 (Powell, *J.*, concurring); *id.* at 772 (Douglas, *J.*, concurring); *id.* at 785 (Brennan, *J.*, dissenting).

We submit, therefore, that expansion of the act of state doctrine to encompass in-court statements of counsel as in the case at bar should be undertaken only if required by the respective roles of the judiciary and the executive in the area of international relations or foreign affairs. We submit further that analysis demonstrates no conceivable justification for such a result. On the contrary, the five factors suggested by the Court in *Sabbatino* as bearing on the relative competencies of the political and the judicial branches in this area show conclusively why a public act of a recognized foreign sovereign committed within its own territory is necessary for the application of the act of state doctrine, and thus why the in-court statement of counsel cannot be deemed such an act of state:

1. *Embarrassment to U.S. Foreign Relations.* In *Sabbatino*, the Court stated:

> "It is . . . evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428.

The Court suggests that the act of state doctrine rightly is invoked where the judicial branch is called upon to rule on difficult political issues beyond its competence and where "the very expression of judicial uncertainty might provide embarrassment to the Executive Branch." 376 U.S. at 433. This *might* have been the situation in the instant case if evidence had been presented which pointed to some act of the Cuban government such as a law or decree expropriating Dunhill's money held by Cuba or repudiating Dunhill's claim for its return. However, it is hard to see

how disregarding the statement of counsel, which statement was not backed by *any* evidence whatsoever of a governmental act, can in any way exacerbate foreign relations or embarrass our government. To allow the statement of counsel, absent any other sovereign act, to be deemed an act of state is to have the courts anticipate a sensitive political issue where in fact one may not exist.

2. *Affront to Foreign Governments.* Another consideration in applying the act of state doctrine is the avoidance of offense to other nations. The Court stated in *Sabbatino*:

> "Such decisions [as validity of title to property] would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep-seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders." 376 U.S. at 431-32.

Absent evidence of some conscious act by the Cuban sovereign that would be disregarded, a decision allowing petitioner to recover on its counterclaim should do little to embarrass the Cuban government. Indeed, the Cuban government has never formally interposed a defense based on its internal law with respect to this matter. When Dunhill recovered a claim against the interventors in the District Court greater than the interventors' award against Dunhill, the District Court, by oversight, failed to grant an affirmative judgment for Dunhill. Dunhill moved to correct this. If any act of state had occurred which precluded compliance with any relief that might be ordered, that was the point in the proceedings at which the inter-

ventors should have raised such opposition. Yet, as the Court noted in granting Dunhill affirmative relief.

> "The interventors have submitted no papers in opposition and do not appear to oppose this application." J. App., 74a.*

Further, it can hardly be an affront to a foreign sovereign to prevent its unjust enrichment at the expense of an innocent third party when the sovereign has itself selected the forum in which to litigate the issues. As suggested by the Court in *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955):

> "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice." 348 U.S. at 361-62.

If Cuba is willing to present to the U.S. courts the issue of its entitlement to compensation for shipments, it should be no affront to its sovereignty that related claims are adjudicated and recoveries applied to their satisfaction—particularly in light of the equities here present.

3. *Uncertainty in International Trade.* The Court in *Sabbatino* stated:

> "Another serious consequence . . . would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade." 376 U.S. at 433.

To recognize the statements of counsel as an act of state would not avoid serious alterations to the flow of international trade; it could cause such alterations. For if a statement of counsel is recognized as an act of state, any dispute arising out of a commercial transaction with a foreign government can be immunized from full judicial review in the courts of the United States. We are entering an era marked by a vast increase in commercial dealings between United States nationals and foreign governments—often involving transactions of massive proportions. Under the holding of the Court of Appeals, in disputes arising out of such transactions, our courts will be available to grant relief against the American national, but, with a word from opposing counsel, not in his favor. This is distinctly contrary to current trends in decided cases and to the views of the executive departments. *See infra*, pp. 18-20.

4. *Ease of a Judicial Remedy.* The Court in *Sabbatino* suggested that where the chances for effectuating a judicial remedy are slight, there is reason to invoke the act of state doctrine. 376 U.S. at 431. This was but another way of saying that where sensitive political issues are involved in the adjudication of a case, a court's decision might have no practical impact. This would only embarrass all concerned and denigrate the courts. However, in the instant case, this Court can reach a decision which is easily implemented. A decision for Dunhill would simply permit it to set off the amount of its counterclaim from the pool of funds which the other importers in the instant case owe to the Cuban government.

5. *Codification or Consensus Concerning Law.* The Court stated in *Sabbatino*:

> "It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . ." 376 U.S. at 428.

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* The interventors also could have expressed such opposition in their reply to Dunhill's amended answer, which expressly set forth a counterclaim seeking this judgment. Appendix, pp. 14-18. Although given the opportunity to file such a reply (*Id.*, pp. 19-22) they failed to do so.

The instant case concerns commercial transactions by government agencies. It is a dynamic area of the law, in which concepts of amenability to suit and responsibility for the payment of judgments have been increasingly accepted by all countries. Unlike the situations in *Sabbatino* and *First National City Bank*, in which the validity of a politically sensitive expropriation was involved, no such issue is before the Court in the instant case. Rather the sole issue is Cuba's right to keep the proceeds of Dunhill's payments to which the courts below have found Cuba was never entitled.

There is no better reflection of the current law on the legal responsibilities of foreign states in commercial activities than legislation sponsored by the State and Justice Departments now pending before the Congress which seek to codify what has become United States and general international practice.* These bills would (a) codify into law the so-called "restrictive theory" of sovereign immunity, which the United States has followed since 1952,** and clearly render commercial agencies of foreign governments, such as the interventors here, amenable to suit in the United States in connection with commercial transactions entered into or having an effect within this country, (b) enable litigants not only to obtain valid service on such agencies, but also to obtain execution of judgments against the assets of such commercial agencies, and (c) shift from the executive departments to the courts the responsibility for determining whether claims of immunity from suit or execution of judgment are to be recognized. Cases now abound in which the courts of this country have adjudicated claims against commercial agencies or entities of foreign governments. It is the rare case that attracts attention from the press and commentators in which the

* S. 566 and H.R. 3493, 93d Cong., 1st Sess. (1973).

** *See* Statement of Hon. Charles N. Brower, Legal Advisor Department of State. *House Judiciary Committee Hearings on H.R. 3493*, 93d Cong., 1st Sess. at 15 (1973).

United States government presses claims of immunity for a foreign government.* But this well-defined trend and its proposed codification would be wholly emasculated if it could be easily evaded through the spontaneous, unsupported assertions of litigation counsel that their clients will refuse to pay judgments the courts render.

C. Permitting counsel's statements to constitute an "act of state" would allow foreign states to claim immunity in cases in which the defense of sovereign immunity would not be recognized.

In this case, the Court of Appeals in effect granted Cuba the sovereign immunity it could not otherwise effectively plead. The Court simply assumed that Cuba's possible refusal to recognize liability for this claim precluded our courts from requiring Cuba to do so. Yet had Cuba attempted to raise the defense of sovereign immunity, it would have found:

(1) the doctrine is not available with respect to a commercial activity such as the sale of non-governmental goods [*see* S. 566, 93d Cong., 1st Sess. (1973)]; (2) the doctrine is not available with respect to a counterclaim, regardless of amount, arising from the same subject matter as that sued upon; (3) the doctrine cannot be invoked after the merits of the controversy (here, Cuba's receipt of the moneys paid) have been placed in issue; and (4) the doctrine is generally not applied without a suggestion of immunity filed by the State Department at the request of the foreign sovereign, and here, as far as the record discloses, no such request was made by Cuba and no suggestion of immunity was filed by the State Department. To the extent the latter has indicated any views it would allow full adjudication of Dunhill's claim. *See* RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 69, 70(2)(b) and 71(1).

* *See, e.g.*, Note, *Sovereign Immunity—The Case of the "Imias"*, 68 AM. J. INT'L L. 280 (1974); *Rich* v. *Noviera Vacuba*, 295 F.2d 24 (4th Cir. 1961).

To find for the Republic of Cuba in the instant case thus will revive in another guise what has become a limited sovereign immunity doctrine.* In any case in which a foreign sovereign would wish to avoid judgment against it, it could simply have its counsel stand up in a courtroom and state that the sovereign power's position is that it is not liable for payment, and such an action by counsel will be deemed an "act of state." By simply having counsel come forward in court and state a litigating position, his client would be found immune from suit. For such a result there is no precedent, no logic and no justice.

II.

Assuming that the statements of counsel for the Republic of Cuba that Dunhill's unjust enrichment counterclaim would not be honored do constitute an act of state, an exception to the act of state doctrine was created, under *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), where Dunhill's counterclaim does not exceed the net balance owed to Cuba by Dunhill's co-defendants and where all claims and counterclaims arise out of the subject matter in litigation in this case.

Dunhill is entitled to obtain a judgment for the difference between the amount it owed to the interventors and the amount it previously paid to the interventors for pre-intervention shipments. Even if Cuba had acted to bar Petitioner's claim, the opinions of the majority in *First*

* For discussions of the increasingly narrow limits governments and courts have placed on the sovereign immunity rule, *see Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 INT'L LAWYER 408 (1974); *Hearings, supra*, p. 18.

National City Bank indicate the act of state doctrine should not be applied:

> (a) if no embarrassment to American foreign relations will ensue from a failure to do so, and
>
> (b) if its application would be fundamentally unfair.

Both conditions are present in the case at bar. Indeed, the facts of this case are even stronger than in *First National City Bank*.

A. The court is not barred by the act of state doctrine from considering Dunhill's counterclaim where such consideration will not interfere with American foreign relations.

It is obvious that the question of unjust enrichment being litigated in this case is not a political one. Rather, the issue is virtually identical to the other issues which Cuba voluntarily submitted for judicial resolution by the courts of the United States. The context of this case is purely commercial; there has been no political act by any foreign sovereign; the Cuban government has merely—and belatedly—repudiated an obligation which arose out of a commercial transaction. The concerns of the Court, as reflected in the *Sabbatino* decision, are simply not relevant. This suit is in fact and law an ordinary commercial litigation in which the plaintiff, suing on a series of claims, should be subject to all of the counterclaims asserted by the defendants arising out of essentially the same series of transactions. As this Court has noted, the cases which establish the act of state doctrine

> "[justify] its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government." *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 765.

That consideration is wholly inapposite here. The liability of the parties has already been fully litigated. Neither the Cuban government nor the political branches of our government have taken any official steps to suggest to the courts that the issues presented are inappropriate for judicial determination. Compare the situation in the case of the "Imias"*, in which both governments showed no hesitation about representing to the court that it should keep its hands off.** Allowing Dunhill to set off its counterclaim against the payments its co-defendants are to make will not involve the Court in the question of the validity of a foreign sovereign's acts. It will not "interfere with delicate foreign relations conducted by the political branches." *Id.*, 406 U.S. at 775 (Powell, J., concurring).

The plurality opinion in *First National City Bank* held that "where the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." 406 U.S. at 768. While that case was pending, the Court received a letter from the State Department advising that

> "the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." *Banco Nacional de Cuba* v. *First National City Bank*, 442 F.2d 530, 538 (2d Cir. 1971), *rev'd on other grounds*, 406 U.S. 759 (1972).

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* *Industria Azucarera Nacional & Compania de Refineria* v. *Empresa Navegacion Manbisa* (Civ. No. 7902, D.C.Z. Nov. 1, 1973), noted in 68 AM. J. INT'L L. 280 (1974).

** In *Republic of China*, the Court pointed out that "the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit. . . . Its failure or refusal to suggest such immunity has been accorded significant weight by this Court." *National City Bank* v. *Republic of China*, 348 U.S. at 360.

Although no comparable express representation has been received by the courts in this case, the rationale of Legal Advisor Stevenson's letter and the Court's acceptance of it would seem to apply precisely to this "like case."

B. Fundamental considerations of fairness require that the Court allow Dunhill to set off its counterclaim against the amounts owed to Cuba by its co-defendants.

Sovereign immunity and act of state are court-imposed limitations on their ability to do justice. Accordingly, these doctrines are construed narrowly. They may require individuals to forego adjudication of their otherwise legally cognizable claims to prevent judicial interference with foreign policy. But in an era marked by a vast increase in commercial transactions between American nationals and foreign sovereigns, the Court should not allow these doctrines to become devices by which foreign sovereigns can repudiate their commercial obligations with impunity. The executive has indicated its position in this case—by making no protest to the courts; the legislature is considering S. 566 and H.R. 3493 by whose principles this case is clearly governed. *See, supra*, p. 18. A denial of Dunhill's full counterclaim would be a judicial deviation from this well marked path. It would require an unnecessarily broad application of the act of state doctrine.

More than that, it would be patently unfair if Cuba could collect the amount owed for the post-intervention shipments without subjecting itself to liability for the money it mistakenly received for pre-intervention shipments. As this Court has previously held in *Republic of China:*

> "a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity." 348 U.S. at 364.

The claims and counterclaims being litigated in this action arise out of the same subject matter and involve parallel situations. They all have been tried in the same suit. The Cuban government raised no objection when the suits were consolidated for trial and in fact had the benefit and convenience of litigating a single suit. As Judge Mansfield pointed out in the court below:

> "[S]ince the counterclaim here . . . arises out of a course of dealing with respect to the same subject matter . . . between the same parties or their successors . . . the equities here balance much more heavily in favor of the importers than in the *First National City Bank* case where the counterclaim arose out of a wholly unrelated factual context." J. App., 30a.

Furthermore, the counterclaims which arise out of the same subject matter as Cuba's claims clearly do not exceed the amount of the claim voluntarily put in controversy by the Cuban government, thus avoiding the situation which concerned this Court in *Sabbatino*.* Allowing Dunhill to recover its full counterclaim will not frustrate the aim of the act of state doctrine. Cuba has put an amount of almost $700,000 in controversy in this suit. The doctrine of *First National City Bank* authorizes counterclaims up to that amount.

It cannot be argued that Dunhill will receive a windfall if the Court allows a recovery. It has already been resolved that Dunhill is entitled to recover the money mistakenly paid to Cuba. Furthermore, it has also been resolved that the owners are entitled to payment by Dunhill for the pre-intervention shipments. To the extent that Dunhill cannot recover on its counterclaim, it will be forced

* Cuba's claims against the importers total $699,788.56. J. App., 44a. The total amount of the unjust enrichment counterclaims is $477,200. J. App., 45a.

to pay twice—with interest—once to the owners and again to the interventors. Conversely the interventors will be entitled to retain funds the courts correctly held were paid to them by mistake. The fundamental unfairness of such a result is clear.

C. The Stevenson letter supports the conclusion that an adjudication of Dunhill's counterclaim should not be barred by the act of state doctrine.

The plurality opinion in *First National City Bank* relied heavily on a letter from the State Department authorizing judicial resolution of the counterclaim then before the Court. The conclusion expressed in that letter is applicable no less to the instant case.

The letter itself extends beyond the immediate case to "like cases." *Banco Nacional de Cuba* v. *First National City Bank*, 442 F.2d at 538. It was clearly the opinion of the State Department that American foreign policy did not require restricting the letter's applicability only to the case then at bar.

Furthermore, the case currently before the Court presents an even stronger argument for the application of the policy expressed in that letter. The commercial nature of the transaction, the absolute impossibility that the decision will interfere with foreign relations or embarrass the Executive Branch, and the willingness of the Cuban government to submit to American courts the resolution of its claims arising out of the same subject matter—all these factors make this case even more appropriate than *First National City Bank* for an adjudication of Dunhill's counterclaim without the constraints of the act of state doctrine.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Second Circuit be reversed insofar as it reversed in part the judgment entered in favor of Petitioner, Alfred Dunhill of London, Inc., against the Respondents, the Republic of Cuba and Daniel Solano Pinera, as Interventor.

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